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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1468

FIRST NATIONAL BANK OF PEORIA,
Petitioner,

v.

GAREY R. CHILDS, et al.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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March 23, 1979

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GAREY R. CHILDS, on behalf of himself and all others similarly situated, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

First National Bank of Peoria ("Bank"), Petitioner, requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered August 16, 1978, rehearing denied, October 24, 1978, reversing the judgment of the United States District Court for the Southern District of Illinois, entered on September 6, 1977.

I. OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit to which this petition is addressed is reported at 583 F.2d 918 and also appears at page A-2 of the Appendix to this Petition. That opinion deals with 19 consolidated actions on appeal from district court. The issues involved in this Petition are covered in Parts III

and VII of the Court of Appeals' opinion appearing at pages A-11 and A-24, respectively, of the Appendix. The Court of Appeals' order denying Bank's petition for a rehearing is not reported but appears at page A-28 of the Appendix.

The order of the United States District Court for the Southern District of Illinois dismissing Plaintiff-Respondent's complaint was entered from the bench in open court and was, therefore, unreported. A copy of the abstract of record noting the docket entry ordering dismissal of the complaint appears at page A-29 of the Appendix.

II. JURISDICTIONAL STATEMENT

The order of the Court of Appeals denying rehearing was entered on October 24, 1978. On January 9, 1979, the Honorable John Paul Stevens, Circuit Justice, Seventh Circuit, entered an Order Extending Time to File Petition for Writ of Certiorari to and including March 23, 1979.

This Court has jurisdiction to hear the petition under 28 U.S.C. §1254(1), and the petition has been filed in the time required by 28 U.S.C. §2101(c).

III. QUESTIONS PRESENTED FOR REVIEW

1. Whether a confession of judgment obtained by a creditor pursuant to Illinois law in a contract involving an extension of consumer credit constitutes a "security interest" for the purposes of the Truth in Lending Act and Regulation Z promulgated by the Board of Governors of the Federal Reserve System ("Board") to implement that Act.
2. Whether the entry and execution of a judgment by confession pursuant to Illinois law creates a lien on consumer goods acquired by the debtor more than 10 days after execution of the confession of judgment

by the debtor and more than 10 days after the creditor gives value.

3. Whether a creditor which obtains a confession of judgment from a debtor in accordance with Illinois law and which also acquires a security interest under the Illinois Uniform Commercial Code is required by the Truth in Lending Act and Regulation Z to disclose that the security interest in after-acquired consumer goods is limited to such goods acquired by the debtor within 10 days after the secured party gives value.
4. Whether civil liability may be imposed on a creditor which discloses a security interest in after-acquired property in good faith conformity with Regulation Z and with a model disclosure form contained in a pamphlet published by the Board which contains the imprimatur "Material in this pamphlet has been prepared by the Board of Governors of the Federal Reserve System."

IV. STATUTES AND REGULATIONS INVOLVED

The Truth in Lending Act, 15 U.S.C. §§1601, *et seq.*, and Regulation Z, 12 C.F.R. Part 226, promulgated by the Board pursuant to that Act are the principal federal statute and regulation involved. The specific sections of the Act involved are §105 (15 U.S.C. §1604), §129(a) (15 U.S.C. §1639(a)), and §§130(a), (e), and (f) (15 U.S.C. §§1640(a), (e), and (f)). The pertinent provisions of the Act appear at page A-30 of the Appendix.

The specific sections of Regulation Z involved are §226.2(gg) (12 C.F.R. §226.2(gg)), §§226.8(b) and (d) (12 C.F.R. §§226.8(b) and (d)), and Interpretation §226.202 (12 C.F.R. §226.202). The pertinent provisions of Regulation Z appear at page A-33 of the Appendix.

The statutes of the State of Illinois which are principally involved are Ill. Rev. Stat. ch. 26, §9-204(2),

ch. 77, §§9 and 10, and ch. 110, §50(3), and they appear at page A-38 of the Appendix.

V. STATEMENT OF THE CASE

Respondent brought this action in the United States District Court for the Southern District of Illinois alleging that Petitioner, Bank, a financial institution organized under the laws of the United States with its only banking premises located in the State of Illinois, had violated the Truth in Lending Act and Regulation Z. Original jurisdiction in the United States District Court was conferred by 15 U.S.C. §1640(e).[1]

The consumer credit transaction upon which suit was brought by Respondent was consummated in Illinois. It was an instalment loan granted to Respondent by Petitioner on January 19, 1977, in which the amount financed was $4,447.93 and the finance charge was $777.71. Inasmuch as that transaction involved an extension of consumer credit other than open end, Petitioner furnished to Respondent the disclosures required by 15 U.S.C. §1639(a)[2] and 12 C.F.R. §§226.8(b) and (d),[3] including, *inter alia*, the disclosure required under 12 C.F.R. §226.8(b)(5) that after-acquired property will be subject to the security interest. The required disclosures were made on one side of the Note and Security Agreement evidencing the obligation above the place for the customer's signature, and a copy thereof was furnished to Respondent in connection with the transaction. A copy of said Note and Security Agreement appears at page A-45 of the Appendix.

The federal Truth in Lending Act and Regulation Z

[1] Appendix, p. A-32.

[2] Appendix, p. A-30.

[3] Appendix, p. A-33.

require disclosure of a "description" of "any security interest"[4] retained or acquired in connection with a consumer credit transaction, and Regulation Z[5] defines what constitutes a "security interest" for this purpose. However, the "description" (*i.e.*, the scope) of any such security interest is necessarily determined by the state law under which it is retained or acquired. Thus, the case at bar involves a determination of whether any such "security interest" had been retained or acquired under the federal definition of that term and, if so, the adequacy of the description of such interest or interests provided under state law.

As the Note and Security Agreement will show, Petitioner obtained a confession of judgment pursuant to the Illinois Civil Practice Act (Ill. Rev. Stat. ch. 110, §50(3)[6]) and also retained a security interest in a 1977 GMC pickup truck under the Illinois Uniform Commercial Code ("UCC") (Ill. Rev. Stat. ch. 26, §§1-101, *et seq.*[7]). That is, the Security Interest section of the Note and Security Agreement provided not only for the security interest in the property described, but also stipulated that a "security interest in the personal property and real property other than principal residence of Debtor is created by the Confession of Judgment Clause herein."[8] Thus, Petitioner was claiming and clearly disclosing both

[4] 15 U.S.C. §1639(a) (8); 12 C.F.R. §226.8(b)(5); Appendix, pp. A-31 and A-34, respectively.

[5] 12 C.F.R. §226.2(gg); 12 C.F.R. §226.202; Appendix, pp. A-33 and A-37, respectively.

[6] Appendix, p. A-39.

[7] The security interest in the pickup truck was retained pursuant to Article 9 of the Illinois UCC. The section of that article at issue in the case at bar is §9-204(2) which deals with the security interest in after-acquired consumer goods; Appendix, p. A-38.

[8] Appendix, p. A-45.

devices (*i.e.*, the UCC security interest and the confession of judgment) as security interests.

In relevant part, Regulation Z defines "security interest" as including both "security interests under the Uniform Commercial Code" and "confessed liens whether or not recorded."[9] Pursuant to this definition, Petitioner did not disclose the UCC provision[10] limiting the security interest in after-acquired consumer goods to those acquired by the debtor within 10 days after the secured party's having given value, because Petitioner had a security interest under both the UCC and the confession of judgment, and execution pursuant to a judgment by confession in Illinois is not so limited.[11]

Respondent's complaint in district court contended that the Bank disclosed that it was acquiring a security interest in after-acquired consumer goods acquired more than 10 days after the Bank gave value, but that Illinois UCC §9-204(2) (Ill. Rev. Stat. ch. 26, §9-204(2)) prohibited such a security interest. Respondent alleged that failure to disclose the 10-day limitation on a security interest in after-acquired consumer goods violated the Truth in Lending Act (15 U.S.C. §1639(a)(8)) and Regulation Z (12 C.F.R. §226.8(b)(5)) because it was misleading. Respondent also alleged that the same failure to disclose the 10-day limitation on after-acquired consumer goods violated the Illinois Consumer Fraud Act (Ill. Rev. Stat. ch. 121 1/2, §262) and the Illinois Consumer Installment Loan Act (Ill. Rev. Stat. ch. 74, §66(k)).

Although Respondent's complaint in district court consisted of six counts, three of which were for class

[9] 12 C.F.R. §226.2(gg); Appendix, p. A-33.

[10] Ill. Rev. Stat. ch. 26, §9-204(2); Appendix, p. A-38.

[11] Ill. Rev. Stat. ch. 77, §10; Appendix, p. A-39.

action relief and three of which were for individual relief, all six were based upon but one alleged violation by Petitioner, *i.e.*, disclosure of the allegedly overbroad and unlawful security interest which failed to exclude after-acquired consumer goods acquired more than 10 days after consummation. The complaint, however, did not address the issue of whether Petitioner's security interest under the Illinois confession of judgment extended to consumer goods acquired more than 10 days after the Bank gave value.

Bank filed a motion to dismiss which, after oral argument, was granted by the district court. The district court issued no opinion, and its order dismissing Respondent's complaint was noted in a docket entry.[12]

On appeal, the case at bar was consolidated with 18 other Truth in Lending actions (reported under the caption *Basham v. Finance America Corporation*) which had been either dismissed by the district court or upon which the district court granted summary judgment for defendants.

In reversing the district court with respect to disclosure of the security interest in after-acquired consumer goods, the Court of Appeals reiterated the long-standing Truth in Lending disclosure rule that the "legal extent of a security interest is determined according to state law."[13] The court cited §9-204(2) of the Illinois Uniform Commercial Code which provides that a security interest under an after-acquired property clause applies only to those consumer goods acquired within 10 days after the secured party gives value.

The Court of Appeals, however, did not even consider

[12] Appendix, p. A-29.

[13] 583 F.2d at 924; Appendix, p. A-13.

the federal definition of "security interest" for Truth in Lending purposes as found in 12 C.F.R. §226.2(gg)[14] in order to determine the types of "security interest" requiring disclosure in accordance with 12 C.F.R. §226.8(b)(5).[15] Nor did the Court of Appeals consider the legal effect of the Illinois confession of judgment which, like the UCC security interest, was also obtained pursuant to state law.

The Court of Appeals ruled only on the two counts of Respondent's original complaint alleging violation of the federal Truth in Lending Act, finding, as aforesaid, a violation for failure to disclose the 10-day limitation on the security interest in after-acquired consumer goods. The Court of Appeals did not rule on the two counts relating to alleged violation of the Illinois Consumer Fraud Act or on the two counts relating to alleged violation of the Illinois Consumer Installment Loan Act. However, one of the two Truth in Lending counts was for class action relief, which, if granted on remand, would subject Petitioner to substantial civil penalties.

Petitioner is a national banking association organized under the National Bank Act.[16] As such, it is an "instrumentalit(y) of the federal government, created for a public purpose."[17] Petitioner was created to serve the convenience and needs of its community and is in a position of public trust as a depository of public and private funds. Accordingly, this Petition for review of a judgment involving potentially large class action recoveries is of public concern and should be carefully

[14] Appendix, p. A-33.

[15] Appendix, p. A-34.

[16] 12 U.S.C. §§21, *et seq.*

[17] *Davis v. Elmira Savings Bank*, 161 U.S. 283, 284 (1896).

considered, particularly in view of the fact that the court below failed to consider relevant provisions of federal[18] and state[19] law and/or regulations on which Petitioner relied.

VI. BASIS FOR FEDERAL JURISDICTION

This action was brought by Respondent under the Truth in Lending Act (15 U.S.C. §§1601, *et seq.*) and the Board's Regulation Z (12 C.F.R. Part 226). Thus, original jurisdiction was vested in the United States District Court for the Southern District of Illinois under 15 U.S.C. §1640(e).[20]

VII. REASONS FOR GRANTING THE WRIT

1. The court below has decided a federal question involving the regulatory authority of the Board of Governors of the Federal Reserve System under the Truth in Lending Act in a way which is in direct conflict with an applicable decision of this Court.

The judgment below completely disregards the Regulation Z definition of "security interest"[21] and an Official Board Interpretation of that definition,[22] thus effectively striking down the broad regulatory authority delegated to the Board under 15 U.S.C. §1604 to "effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith."[23]

[18] 12 C.F.R. §226.2(gg) and 12 C.F.R. §226.202; Appendix, pp. A-33 and A-37, respectively.

[19] Ill. Rev. Stat. ch. 77, §10 and ch. 110, §50(3); Appendix, p. A-39.

[20] Appendix, p. A-32.

[21] 12 C.F.R. §226.2(gg); Appendix, p. A-33.

[22] 12 C.F.R. §226.202; Appendix, p. A-37.

[23] Appendix, p. A-30.

In a secured transaction, the Truth in Lending Act requires that a creditor disclose a "description" of the security interest retained or acquired and a "clear identification of the property to which the security interest relates."[24] The Board expanded this statutory requirement to provide that "[i]f after-acquired property will be subject to the security interest, . . . this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired."[25]

The Truth in Lending Act, however, contained no definition of the term "security interest," leaving that definition to the Board in its regulations. Given the vast array of security devices available throughout the country, the Board defined that term broadly in 12 C.F.R. §226.2(gg) to include ". . . any interest in property which secures payment or performance of an obligation," and provided further that the term includes, but is not limited to, "confessed liens whether or not recorded."

In order to leave absolutely no doubt about the scope of its definition of the term "security interest," the Board issued Official Board Interpretation §226.202 (34 *Federal Register* 8698) on May 26, 1969—more than one month before the effective date of the Truth in Lending Act. That Interpretation provides, in relevant part, as follows:

> In some of the States, confession of judgment clauses or cognovit provisions are lawful and make it possible for the holder of an obligation containing such clause or provision to record a lien on property of the obligor simply by recordation entry of judgment; the obligor is afforded no opportunity to enter a defense against such action prior to entry of the judgment.

[24] 15 U.S.C. §1639(a)(8); Appendix, p. A-31.

[25] 12 C.F.R. §226.8(b)(5); Appendix, p. A-34.

> Since confession of judgment clauses and cognovit provisions in such States have the effect of depriving the obligor of the right to be notified of a pending action and to enter a defense in a judicial proceeding *before* judgment may be entered or recorded against him, such clauses and provisions in those States are security interests under §226.2(gg) and for the purposes of §226.7(a)(7), §226.8(b)(5), and §226.9. This is the case even if the judgment cannot be entered until after a default by the obligor. (emphasis in original text)

A confession of judgment clause under the law of the State of Illinois[26] (discussed, *infra*) does, in fact, deprive the obligor of the right to be notified and enter a defense before entry of judgment; accordingly, a confession of judgment under Illinois law is, in fact, a "security interest" for federal Truth in Lending purposes.

This Court, in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), confirmed the Board's authority to extend by regulation the coverage of the Truth in Lending Act to transactions payable in more than four instalments where no separate finance charge was imposed. In discussing the fact that the Truth in Lending Act, when passed, had to deal with the many forms of existing and future transactions, this Court made the following observation:

> To accomplish its desired objective, Congress determined to lay the structure of the Act broadly and to *entrust its construction* to an agency with the necessary experience and resources to monitor its operation. Section 105 [15 U.S.C. §1604] delegated to the Federal Reserve Board broad authority to promulgate regulations necessary to render the Act effective. (411 U.S. at 365; emphasis supplied)

[26] Ill. Rev. Stat. ch. 110, §50(3); Appendix, p. A-39.

Mourning, supra, dealt with the Board's authority to promulgate regulations "to prevent circumvention or evasion" of the Truth in Lending Act. In reversing the Court of Appeals for the Fifth Circuit in *Mourning, supra*, this Court said:

> Congress was clearly aware that merchants would evade the reporting requirements of the Act by concealing credit charges. In delegating authority to the Board, Congress emphasized the Board's authority to prevent such evasion. To hold that Congress did not intend the Board to take action against this type of manipulation would require us to believe that, despite this emphasis, Congress intended the obligations established by the Act to be open to evasion by subterfuges of which it was fully aware. As in *Gemsco*, the language of the enabling provision precludes us from accepting so narrow an interpretation of the Board's power. (411 U.S. at 371)

The statutory delegation of regulatory authority[27] also directs the Board in its regulations "to effectuate the purposes" of the Truth in Lending Act. It is clear, therefore, from *Mourning, supra*, that the Board has the authority in its "construction" of the Act to define the term "security interest" in such a way as to give effect to the intent of Congress.

The provisions of the Truth in Lending Act which require disclosure of a security interest[28] were added on the floor of the House of Representatives during debate on H.R. 11601, 90th Congress, First Session (1967)[29] and

[27] 15 U.S.C. §1604; Appendix, p. A-30.

[28] Finally enacted as 15 U.S.C. §1639(a)(8); Appendix, p. A-31.

[29] The amendment was added as paragraph (8) of §203(c) of H.R. 11601 and was included word for word in 15 U.S.C. §1639(a)(8).

have survived verbatim in the Act. Accordingly, it is appropriate to look at the legislative history of that amendment and the views of its advocates in order to ascertain the legislative intent. *United States v. Public Utilities Commission of California*, 345 U.S. 295 (1953); *United States v. Bryan*, 339 U.S. 323 (1950); *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944).

In introducing the amendment requiring disclosure of a security interest, Representative William T. Cahill of New Jersey said that, without the amendment, the bill under consideration contained "serious and important omissions which should be corrected."[30] "These omissions," he said, "relate primarily to consumer credit extended on the security of mortgages and liens."[31] Saying that failure to disclose the existence of a security interest (particularly in a borrower's home) was an "unscrupulous fraud," Representative Cahill stated that his amendment was intended to correct cases in which the borrower is "never informed nor aware"[32] that his property is being made subject to a mortgage or lien.

The House of Representatives promptly agreed to the Cahill amendment and formally passed it on February 1, 1968.[33] On May 22, 1968, both the House of Representatives and the Senate agreed to the Conference Report[34] containing the Cahill amendment requiring disclosure of any security interest retained or acquired in connection with a consumer credit transaction.

[30] *Daily Congressional Record*, January 31, 1968, Vol. 114, p. H 631.

[31] *Ibid.*

[32] *Ibid.*

[33] *Daily Congressional Record*, Vol. 114, pp. H 708 and H 709.

[34] Report No. 1397, 90th Cong., 2d Sess. (1968); adoption recorded at *Daily Congressional Record*, Vol. 114, pp. H 4126 and S 6120.

The clear import of that floor amendment was to require notice to a consumer that his or her property secured payment of a debt. Inasmuch as an Illinois confession of judgment does, in fact, make that property available "without process,"[35] the Board's promulgation of §226.2(gg) and Interpretation §226.202 clearly comport with the legislative intent.

The judgment of the court below completely ignored the Board's definition of "security interest" in §226.2(gg) as interpreted by Official Board Interpretation §226.202 thus, in effect, vitiating the Board's delegated authority to "effectuate" the purposes of the Truth in Lending Act.

Both §226.2(gg) and Official Board Interpretation §226.202 became effective on July 1, 1969, the effective date of the Act, and have never been amended. Together, they reflect the Board's official position on what constitutes a "security interest" for purposes of disclosure. As such, they are a "contemporaneous construction" of the Act and are entitled to great deference. In *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961), this Court stated: "[p]articularly in this respect due when the administrative practice at stake involves a contemporaneous construction of a statue by the men charged with the responsibility of setting its machinery in motion, making the parts work efficiently and smoothly while they are yet untried and new."[36] Accord, *Udall v. Tallman*, 380 U.S. 1 (1965).

In *Mourning, supra*, this Court confirmed that position with the following observation: "We have consistently held that . . . courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority."[37]

[35] Ill. Rev. Stat. ch. 110, §50(3); Appendix, p. A-39.

[36] 367 U.S. at 408.

[37] 411 U.S. at 371.

Courts are not generally free to substitute their own discretion for that of an administrative agency that has kept within the bounds of its powers, unless the rules of that agency are ". . . the expression of a whim rather than an exercise of judgment."[38] Such is clearly not the case here. "Whim" is defined as a "capricious or eccentric idea, notion, or vagary usu. occurring suddenly or spontaneously."[39] Given the legislative history of the disclosure requirement for a security interest, the Board's definition of that term cannot by any stretch of semantic license be considered as a "whim." It gives effect to the clear and unambigous legislative intent regarding disclosure of a security interest by including within the definition of that term a contractual provision under which judgment may be entered without prior notice, thereby subjecting a debtor's property to seizure and sale upon execution of such a judgment.

Not only are §226.2(gg) and Official Board Interpretation §226.202 to be accorded great deference because they are a "contemporaneous construction" of the statue, but also because Congress has reviewed the statue a number of times and amended it at least five times[40] without modifying the Board's definition of "security interest" in 12 C.F.R. §226.2(gg) or its Interpretation §226.202. Thus, it may be presumed that the regulation and the interpretation reflect congressional intent.

[38] *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 236 (1936).

[39] *Webster's Third New International Dictionary* (Springfield, Mass.: G. & C. Merriam Company (1961)).

[40] Act of October 26, 1970, Pub.L. 91-508; Act of October 28, 1974, Pub. L. 93-495; Act of January 2, 1976, Pub. L. 94-205; Act of February 27, 1976, Pub.L. 94-222; Act of March 23, 1976, Pub. L. 94-240.

A case directly in point is *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267 (1974). That case involved the question of whether the National Labor Relations Act (NLRA), as amended by the Taft-Hartley Act, excludes "managerial employees" from the protection of NLRA. The Wagner Act (the original NLRA) did not expressly mention the term "managerial employee," but the National Labor Relations Board created that category by regulation as one which may not be included in a bargaining unit with rank-and-file employees. The Taft-Hartley amendments created several other categories of excluded employees but did not specifically mention "managerial employees." In holding that Congress intended to exclude "managerial employees" from the protection of NLRA, the Court said:

> [A] court may accord great weight to the longstanding interpretations placed on a statute by an agency charged with its administration. This is especially so where the Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress. (416 U.S. at 274)

Accord, *National Labor Relations Board v. Boeing Co.*, 412 U.S. 67, 75 (1973); *Griggs v. Duke Power Co.*, 401 U.S.424, 433-34 (1971); and *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 381 (1969).

Three of the five amendments to the Act passed by Congress since the Board promulgated 12 C.F.R. §226.2(gg) and Interpretation §226.202 have dealt specifically with the Board's regulatory authority by extending and enhancing it, not be restricting or otherwise diminishing it. None of those amendments have revised, repealed or otherwise altered either 12 C.F.R. §226.2(gg) or 12 C.F.R. §226.202. Under the foregoing authorities, the conclusion is inescapable that Congress intended the

Board's regulation and its interpretation of the regulation to stand. This Court should affirm the efficacy of 12 C.F.R. §226.2(gg) and 12 C.F.R. §226.202 as promulgated.

2. The court below has decided an important question of Illinois law in a way which is in conflict with applicable Illinois statutes and interpretations of those statutes by the Illinois courts.

Although the court below acknowledged that the "legal extent of a security interest is determined according to state law,"[41] and that "state law limitations on such security interests" determine the Truth in Lending disclosures required,[42] it then proceeded to ignore completely the Regulation Z definition of what constitutes a "security interest," and, equally important, it ignored completely the provisions of state law which determine the scope of one of the types of security interest therein defined—a confession of judgment such as that retained and disclosed by Petitioner.

Had Petitioner made the disclosure as directed by the court below, it would have, in fact, misled its customers, including Respondent, by indicating that its right to seize and sell consumer goods upon default on the obligation were limited to those consumer goods acquired within 10 days after the transaction when, in fact, the confession of judgment clause would have permitted it to levy against all such after-acquired property except that contractually excluded, irrespective of when acquired.

Section 50(3) of the Illinois Civil Practice Act[43] specifically provides for confessions of judgment "without process." That subsection stipulates that applications to

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[41] 383 F.2d at 924; Appendix, p. A-13.

[42] *Ibid.*

[43] Ill. Rev. Stat. ch. 110, §50(3); Appendix, p. A-39.

confess judgment may be made, *inter alia*, in the county in which "any property, real or personal" of the defendant is located. Although the constitutionality of that provision of law is not at issue in the case at bar, the Illinois Supreme Court has specifically upheld its constitutionality in *First National Bank in DeKalb v. Keisman*, 47 Ill. 2d 364, 265 N.E. 2d 662 (1970).

Under Illinois law, execution of a judgment by confession is no different from execution of any other kind of judgment. Upon delivery to the sheriff, an execution on any judgment become a lien upon all "goods and chattels of the person against whom it is issued."[44] Similarly, upon execution of any judgment, including a judgment by confession, "all and singular the lands, tenements, his real estate, goods and chattels" of the defendant "shall be liable to be sold."[45]

The courts of Illinois have consistently held that a judgment by confession becomes a lien on personal property upon execution of the judgment. For example, in *Haugens v. Holmes*, 41 N.E. 2d 109 (1942), the Appellate Court of Illinois, Second District, held that ". . . a lien is created, which attaches to real estate when the judgment is entered, and to personal property when the execution is placed in the hands of the sheriff or other proper officer."[46] Accord, *Fallows v. Continental & Commercial Trust & Savings Bank*, 235 U.S. 300, 302 (1914).

Thus, in the case at bar, by executing the confession of judgment, Respondent subjected *all* of his real estate (except any real property which is used or expected to be

[44] Ill. Rev. Stat. ch. 77, §9; Appendix, p. A-39.

[45] Ill. Rev. Stat. ch. 77, §10; Appendix, p. A-39.

[46] 41 N.E. 2d at 111.

used as the principal residence of Respondent—a contractual rather than a statutory exception[47]) to a lien upon entry of a judgment by confession. Similarly, Respondent subjected *all* of his personal property to a lien upon execution of any such judgment by confession. This right of a judgment creditor under Ill. Rev. Stat. ch. 77, §10 applies to all real and personal property and is not limited to consumer goods acquired within 10 days after the secured party gives value. Moreover, under Ill. Rev. Stat. ch. 110, §50(3), it may be exercised by the creditor *without prior notice* to the debtor.

Thus, disclosure of the 10-day limitation on the security interest in after-acquired consumer goods under the UCC in accordance with the judgment of the Court of Appeals would, in fact, mislead customers and therefore constitute a violation of Regulation Z.

In this connection, it should be noted that §9-204(2) of the Illinois Uniform Commercial Code (Ill. Rev. Stat. ch. 26, §9-204(2)) which provides the 10-day limitation on a security interest in after-acquired consumer goods was last amended and re-enacted effective July 1, 1973. However, Ill. Rev. Stat. ch. 77, §10 providing for execution of judgments, including judgments by confession, on *all* property of the debtor was last amended and re-enacted effective October 1, 1976. Thus, the provision of Illinois law giving the holder of a confession of judgment authority to levy upon *all* after-acquired consumer goods is a later expression of legislative intent than is the Illinois UCC provision limiting the security interest in after-acquired consumer goods to such goods acquired within 10 days after the secured party gives value. Should this Court perceive an irrevocable conflict between the two

[47] The Confession of Judgment clause (paragraph 2) of the Note and Security Agreement specifically excludes "any real property which is used or expected to be used as the principal residence of the undersigned Debtor(s)" from the operation of that clause; Appendix, p. A-45.

provisions of law, the later enactment by the legislature must control.

It is apparent from this statutory structure, however, that at least two separate and distinct security devices are available to creditors under Illinois law: a security interest under the Uniform Commercial Code and a confession of judgment. Since the Truth in Lending disclosures are determined by the extent of the security interest under state law, a creditor which retains a security interest in the form of a confession of judgment *must* disclose for Truth in Lending purposes a security interest in after-acquired property *without* the 10-day limitation stipulated in the Uniform Commercial Code.

It should be pointed out that although the court below cited as controlling its earlier opinion in *Tinsman v. Moline Beneficial Finance Co.*, 531 F.2d 815 (7th Cir. 1976), the contract and security agreement which was at issue in that opinion did *not* contain a confession of judgment. Thus, it is clearly distinguishable from the case at bar. Similarly, the decision in *Pollack v. General Finance Corp.*, 535 F.2d 295 (5th Cir. 1976), rehearing denied, 552 F.2d 1142 (5th Cir. 1977), cert. denied, 434 U.S. 891 (1977), cited also as controlling by the court below, did *not* involve a contract or security agreement containing a confession of judgment. Accordingly, it, too, may be distinguished from the case at bar.

The court below decided an important question of Illinois law which is clearly at odds with the unambiguous provisions of Illinois statutes and with opinions of the Illinois courts, including the Illinois Supreme Court. For that reason, this Court should affirm these provisions of Illinois law, just as the Eighth Circuit Court of Appeals did in *Turner v. Alton Banking & Trust Co.*, 181 F.2d 899 (1950), when it held that ". . . the courts of Illinois recognize such warrants [to confess judgment] as valid and permit judgments to be taken upon them."[48]

[48] 191 F.2d at 905.

3. The court below has decided that a creditor may be held liable for civil penalties under the Truth in Lending Act for having made disclosures under that Act in conformity with a rule, regulation, or interpretation of the Board of Governors of the Federal Reserve System, notwithstanding the provisions of 15 U.S.C. §1640(f) which bar such penalties. This is an important question of federal law which has not been, but should be, settled by this Court.

In 1969, the Board published a pamphlet entitled "What You Ought to Know About Federal Reserve Regulation Z" and included in that pamphlet a number of forms, called "model forms" by the Board, to guide creditors in making disclosures under Regulation Z. One of those forms, "DISCLOSURE STATEMENT OF LOAN (EXHIBIT E),"[49] disclosed the security interest in after-acquired property using the following language: "The Security Agreement will secure future or other indebtedness and will cover after-acquired property." This pamphlet is key to the decision in the case at bar, because it contained the following imprimature: "Material in this pamphlet has been prepared by the Board of Governors of the Federal Reserve System."

Since the material in the pamphlet had been "prepared" by the Board (not merely by its staff) and issued contemporaneously with Regulation Z, it must be construed as an "interpretation" of the regulation's requirements by the Board. It was an "administrative interpretation" which has been variously defined as "statements as to what the administrative officer thinks the statute or regulation means"[50] and "a clarification or explanation of existing laws or regulations."[51] The fact

[49] Appendix, p. A-41.

[50] *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

[51] *Continental Oil Company v. Burns*, 317 F. Supp. 194, 197 (1970).

that it did not bear the designation as an "interpretation" is immaterial; it must be considered as such.

As this Court said in *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), "[t]he particular label placed upon [the order] by the [Federal Communications] Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive."[52] Clearly, it is the substance of what the Board purported to do and did in its pamphlet which is decisive: it furnished a model form "which will show how a creditor may comply with the disclosure requirements of the provisions of paragraphs (b) and (d) of §226.8 of Regulation Z."[53]

At the time the pamphlet was prepared and issued in 1969, the Uniform Commercial Code had been adopted in 49 states and the District of Columbia;[54] thus, the Board was on reasonable notice that the 10-day limitation on after-acquired consumer goods was in effect in all but one state.[55] Nonetheless, the Board included a simple reference to "after-acquired property" without disclosing the 10-day limitation on after-acquired consumer goods.

Petitioner, relying on the fact that the "material" in the pamphlet, including the "model form," had been prepared by the Board, drafted its after-acquired property disclosure in strict conformity with the Board's model form.

More important, Petitioner relied on the clear wording

[52] 316 U.S. at 416.

[53] Appendix, p. A-41.

[54] MARTINDALE-HUBBELL LAW DIRECTORY, 1979 (Summit, N.J.: Martindale-Hubbell, Inc., 1979), Vol. VII at 4243.

[55] Louisiana; *Ibid.*

of §226.2(gg) of Regulation Z which defines a security interest as including "confessed liens whether or not recorded" and an Official Board Interpretation §226.202 which further defines "security interest" as including a confession of judgment of the type regularly taken (and taken in the case at bar) in the State of Illinois. Based on these provisions of Regulation Z, Petitioner did not disclose the 10-day limitation on after-acquired consumer goods as provided in the UCC, because the confession of judgment security interest taken by Petitioner applied to *all* after-acquired consumer goods, regardless of when acquired.

In 1974, Congress amended the Truth in Lending Act to provide that a creditor shall have no civil or criminal liability for ". . . any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board."[56]

Since the case at bar is premised on a transaction entered into between Petitioner and Respondent more than two years after that 1974 amendment to the Truth in Lending Act, Petitioner's good faith conformity with the "model form" issued in an interpretative pamphlet "prepared" by the Board and with the clear and unambiguous provisions of §226.2(gg) and Interpretation §226.202 of Regulation Z protect it from liability for civil penalties, even if this Court should determine that the "model form," §226.2(gg), and Interpretation §226.202 are all invalid. This Court should confirm that no liability may be imposed against Petitioner for reason of its good faith conformity with a rule, regulation, or interpretation of the Truth in Lending Act by the Board.

[56] Pub. L. 93-495, §406; 15 U.S.C. §1640(f); Appendix, p. A-32.

VIII. CONCLUSION

The clear and unequivocal provisions of 12 C.F.R. §226.2(gg) and 12 C.F.R. §226.202 include within the definition of "security interest" any confession of judgment under which a lien on property of the obligor may be entered by recordation and without notice. Those provisions of Regulation Z clearly effectuate the purposes of the Truth in Lending Act and should be controlling in the case at bar. This Court should affirm that Respondent's confession of judgment in favor of Petitioner constituted a "security interest" under the Truth in Lending Act and Regulation Z.

Similarly, Illinois law quite clearly permits a creditor, where judgment has been confessed, to obtain a lien upon the property of the judgment debtor without notice and proceed to execute that judgment by seizure and sale of the debtor's property. The consumer goods which are subject to satisfaction of that judgment are not limited to consumer goods acquired within 10 days of the creditor's having given value. Therefore, this Court should affirm that where a creditor obtains a confession of judgment under Illinois law, that creditor is not required to disclose for Truth in Lending purposes that the security interest in after-acquired consumer goods is limited to such goods as are acquired within 10 days after the secured party gives value.

Since Petitioner in the case at bar relied upon the clear and unambiguous language of 12 C.F.R. §226.2(gg) and 12 C.F.R. §226.202 promulgated by the Board to implement the Truth in Lending Act and on "model forms" which had been "prepared" by the Board, civil liability may not be imposed on Petitioner until after such provisions of the regulation and "model form" have been determined to be "invalid" by this Court. Since this Court has made no such declaration of invalidity, this Court should affirm that no civil penalties are recoverable from Petitioner, even if this Court should now find those provisions invalid.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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